Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations	)	CC Docket No. 01-150

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel, hereby offers the following comments on the *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 01-205, in the above-referenced proceeding, released July 20, 2001 ("*NPRM*"). In the *NPRM*, the Commission asks, among other things, whether " it would serve the public interest to amend our rules to relieve all non-dominant carriers, or certain categories of non-dominant carriers, that have blanket domestic section 214 authority from filing [domestic] transfer of control applications."[1] ASCENT supports the Commission's efforts to streamline its Section 214 rules as they apply to the acquisition of corporation control of domestic carriers and believes that in the vast majority of circumstances, the filing of such transfer of control applications by non-dominant carriers will not be necessary in order to protect and advance the public interest.

[1] *NPRM*, FCC 01-205, ¶ 33.

Domestic applications for transfer of control will continue to serve a useful purpose, assisting the Commission in determining whether a corporate acquisition is in the public interest when dominant carriers are involved, where such corporate acquisition involves affiliates of dominant carriers, and when nondominant carriers possessing size and scope sufficient to adversely impact a particular geographic market or service segment seek such authority. The Commission clearly possesses the authority to review and approve acquisitions of corporate control of entities which have been granted blanket domestic section 214 authority. With the exception of the situations described above (which may realistically hold the potential for adversely affecting the public interest), however, the exercise of that authority would represent a needless expenditure of Commission and industry resources in the vast percentage of corporate transfers of control, where the Commission is simultaneously considering an application for transfer of control of the respective carriers pursuant to the Commission's *international* Section 214 Rules.[2]

As the Commission notes, the scope and application of §63.01 have been the source of confusion among carriers with respect to the necessity of filing applications to transfer control of entities which have been granted blanket authority to operate domestically. In the Declaratory Ruling portion of the *NPRM*, the Commission alleviates this confusion, making clear that only "connecting carriers" are exempt from the obligation to "file domestic section 214 applications for acquisitions of corporation control."[3]

Adding to this confusion, §63.18(e)(3) of the Commission's rules provides specific notice of the information which the Commission deems relevant to consideration of an international Section 214 transfer of control application; however, the Commission's Rules provide no

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[2] 47 C.F.R. §63.18(e)(3).

[3] *NPRM*, FCC 01-205, ¶ 7.

corresponding guidance with respect to domestic applications. Thus, it is not surprising that "[t]here has been some uncertainty concerning the appropriate content of a section 214 application seeking consent to the acquisition of corporate control of domestic interstate lines." Through *Public Notice* DA 01-1654, issued concurrently with the *NPRM*, the Commission has alleviated much of this remaining "uncertainty", announcing for the first time the information upon which an informed Commission decision could be based in most circumstances:

> "(1) a description of the transaction and the parties involved; (2) a description of the type of services the parties provide and the locations where those services are provided; (3) a list of any applications pending or to be filed with the Commission that relate to the same transaction; (4) a copy of the relevant merger agreement, if any; and (5) a statement based on which the Commission could determine, in conjunction with other record evidence, that granting the application will serve the public interest, convenience and necessity."[4]

[4] Id., p. 2.

Naturally, it is appropriate for the Commission to reserve the right to request additional information in situations where a public interest analysis could not be fully undertaken on the basis of this bare-bones level of information. Fortunately, in the vast majority of cases, the Commission will already have available to it additional information, provided by the carriers in satisfaction of §63.18(e)(3).[5] With respect to such applications as well, the Commission "reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination."[6] Thus, whenever a carrier has filed an application for acquisition of corporate control pursuant to Section 63.18, the Commission will already have available to it more information than *Public Notice* DA 01-1654 directs carriers to provide in connection with the corresponding domestic application. Requiring the entities to file a superfluous domestic application under these circumstances constitutes a needless waste of both Commission and carrier manpower and financial resources.

As the Commission also notes, acquisition of corporate control is frequently a time-sensitive endeavor where the very viability of the acquired firm may be at stake. A regulatory process which requires carriers to await the issuance of two separate decisions, rather than deeming the domestic transfer authority to be routinely granted simultaneously with the international application grant order, is a highly inefficient one. A system which compounds this process by requiring not only the filing of two separate applications (accompanied by two separate filing fees) but also in many cases applications for waiver or emergency grant to address issues of extreme

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[5] *See* 47 C.F.R. §63.18(e)(3) ("applicant shall complete paragraphs (a) through (d) of this section for both the transferor/assignor and the transferee/assignee. . . transferee/assignee needs to complete paragraphs (h) through (p) of this section . . . include a narrative of the means by which the transfer or assignment will take place.")

time-sensitivity (which will no doubt affect the transfer of control under both §§63.18 and 63.01), would seem to be moving farther away from the streamlined, paperless environment which the Commission is working diligently to achieve in so many other areas. In light of the information which will be available to the Commission (which may be augmented as necessary to ensure a well-reasoned public interest determination), ASCENT urges the Commission to refrain from requiring the filing of domestic Section 214 transfer of control applications in the vast majority of circumstances where the carriers have filed a similar application pursuant to §63.18 of the Commission's Rules, and to deem such domestic transfer of control authority granted upon grant of the §63.18 authority.

As noted above, however, certain situations will by their very nature possess a much greater likelihood of negatively impacting the public interest. Indeed, a domestic transfer of control application may represent the Commission's only realistic opportunity to evaluate the potential effects of the proposed acquisition on competition. Strict scrutiny of such transactions, which ordinarily would involve dominant carriers and/or their affiliates, or very large non-dominant carrier, remains vitally important in order that the Commission might fulfill its obligation to ensure that competition will not be thwarted by the merger of two entities (or two related families of entities).

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[6] Id.

Illustrating ASCENT's point, in both the *GTE/Bell Atlantic Merger Order*[7] and the *SBC/Ameritech Merger Order*,[8] the Commission ultimately determined the mergers to be not adverse to the public interest only because conditions were specifically imposed upon the merger with an aim toward "substantially mitigate the potential public interest harms of the proposed merger."[9] "These conditions and others," held the Commission, "make competition . . . more likely, thereby offsetting in part the competitive threat that each Applicant posed to the other."[10] An extensive analysis of the issues raised by the mergers, aided by active public comment cycles, was required in order for the Commission to reach its public interest determination in these cases.[11] The *GTE/Bell Atlantic Merger Order* issued eight months after the filing of the application; the *SBC/Ameritech Merger Order* ultimately issued 15 months after the filing of that application.

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[7] Application of GTE Corporation and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License (Memorandum Opinion and Order), 15 FCC Rcd. 14032 (2000) ("GTE/Bell Atlantic Merger Order").

[8] Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 25, 63, 90, 95 and 101 of the Commission's Rules (Memorandum Opinion and Order), 14 FCC Rcd. 14712 (1999) ("Ameritech/SBC Merger Order").

[9] GTE/Bell Atlantic Merger Order, ¶ 349. *See also* ¶ 366 ("[T]hese conditions mitigate, in many important ways, the potential public interest harms of the proposed transaction.").

[10] Id., ¶¶ 351, 352.

[11] Even following adoption of the Merger Conditions, the Commission continues to be called upon to resolve complaints lodged against the surviving entities of both mergers alleging failure to comply with various merger conditions and documenting the perceived anticompetitive results thereof. *See, e.g.*, *Ex Parte* Letters filed by Verizon and Birch Telecom, Inc., and *Ex Parte* Submission of WorldNet Telecommunications, Inc., Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket No. 98-141, Application of GTE Corporation, Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184.

In considering similar applications filed by other dominant carriers, the Commission has likewise taken care to fully consider the issues raised prior to issuing its decision. The *Qwest/USWest Merger Order* issued nearly seven months after filing of the application;[12] the *SNET/SBC Merger Order* issued nearly eight months after filing of the application;[13] the *NYNEX/Bell Atlantic Merger Order* ultimately issued more than 13 months after filing of the application.[14] In light of the time required for prior Commission consideration of merger applications involving dominant carriers and/or their affiliates, for the Commission to even entertain whether "a 60-day review period for dominant carriers should apply with respect to acquisitions of corporate control"[15] seems overly (and unrealistically) optimistic. Even as it supports generally the Commission's efforts to streamline Commission processes, ASCENT opposes adoption of any particular review period for domestic Section 214 applications for acquisition of corporate control which involve dominant carriers and/or their affiliates. The public interest demands that the Commission take whatever time is necessary in order to reach a well-reasoned decision; having never come close to a 60-day grant time frame, the Commission should not restrict its ability to evaluate dominant carrier acquisition of control applications.

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[12] Qwest Communications, International, Inc. and U S West, Inc., Application for Transfer of Domestic and International §§ 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License (Memorandum Opinion and Order), 15 FCC Rcd. 11909 (2000).

[13] Applications for Consent to Transfer of Control and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee (Memorandum Opinion and Order), 13 FCC Rcd. 21292 (1998).

[14] Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 99985 (1997).

[15] *NPRM*, FCC 01-205, ¶ 26.

ASCENT also opposes the adoption of an across the board "31-day review period for non-dominant carriers."[16] As noted above, a large percentage of domestic acquisition of control situations will arise within the context of a transaction which also requires the carriers to submit a transfer of control application pursuant to §63.18(e)(3) and which, in the case of most non-dominant carriers, could be deemed automatically granted upon issuance of the §63.18(e)(3) grant order. In a few circumstances, however, even non-dominant carriers may possess sufficient product market share or geographic density to potentially impact the public interest much like (albeit to a lesser degree) acquisitions of control by dominant carriers and/or their affiliates.

[16] Id.

Commission experience has likewise demonstrated that significantly longer than 31 days is required to adequately evaluate the public interest concerns raised by acquisitions of control by large non-dominant carriers. For example, the Commission required slightly longer than six months to evaluate and issue an order approving the proposed merger of Tele-Communications, Inc. and AT&T Corp.,[17] and more than 11 months to approve the WorldCom/MCI acquisition of control.[18] It would be equally ill-advised for the Commission to limit its ability to properly evaluate applications implicating the public interest when those issues arise not in the context of a dominant carrier (or affiliate) application for acquisition of control, but rather in the case of an acquisition of control involving a very large non-dominant carrier.

As noted above, ASCENT urges the Commission to adopt a policy pursuant to which the large bulk of non-dominant carrier applications for domestic acquisition of control authority will be deemed automatically granted upon the grant of an application filed pursuant to §63.18 of the Commission's Rules. For the remainder of domestic acquisition of corporate control applications filed by non-dominant carriers, ASCENT urges the following thresholds for determining when streamlined treatment may appropriately be accorded. Only when both thresholds can be satisfied by all entities involved should the Commission deem the public interest concerns sufficient minimal to warrant streamlined treatment.

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[17] Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 (1999).

[18] Application of WorldCom, Inc. and MCI Communications Corporation, for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Memorandum Opinion and Order), 13 FCC Rcd. 18025 (1998).

No panacea exists by which the Commission might definitively determine which non-dominant carrier acquisitions of corporate control are likely to implicate public interests concerns. The *NPRM* notes, however, certain characteristics of larger carriers which may be helpful in the development of a bright-line test which will identify, at least in most cases, applications which may safely be afforded streamlined treatment.[19] For example, the Commission would look to net sales or total assets of the respective parties as a tool to gauge the likelihood that acquisition of one entity by the other would appropriately require a higher level of scrutiny than streamlined review would provide.[20] ASCENT agrees that a consideration of the relative total assets would be helpful, however, it is not necessarily a given, in today's diversified economy, that one or both parties to such an acquisition will be exclusively in the business of providing telecommunications services. The more relevant focus would thus be on the net telecommunications sales, or the total telecommunications assets, of the respective parties. This would certainly provide the Commission a clearer picture of the likelihood of the acquisition to cause a potential distortion of the telecommunications marketplace. Although bright-line tests to a certain degree must always be arbitrary, ASCENT urges the Commission to adopt a threshold showing pursuant to which domestic applications for corporate control in which neither carrier has net telecommunications sales or total telecommunications revenues in excess of $500 million will be accorded streamlined treatment, provided the carriers can also satisfy the second threshold set forth below.

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[19] The Commission also asks "whether certain criteria should automatically disqualify applicants from streamlined review. (*NPRM*, ¶ 24.) As set forth above, given the significant public interest concerns which almost uniformly arise when dominant carriers and/or their affiliates are involved in a corporate acquisition, dominant carrier (or affiliated entity) acquisition of corporate control applications should never be eligible for streamlined treatment.

[20] *NPRM*, FCC 01-205, ¶ 22.

As the Commission also points out, another relevant, though difficult to determine characteristic of carriers which may in combination hold the potential to negatively impact the public interest would be the respective market shares of the carriers.[21] In furtherance of its Congressional directive that it "take actions to open all telecommunications markets to competition and seek[] to promote innovation and investment by all participants," the Commission has put into effect certain reporting mechanisms designed "to collect basic information about two critical and dynamic areas of the communications industry: the development of local telephone service competition and the deployment of broadband services."[22] In order to gather data concerning the deployment of these services, the Commission has directed that FCC Form 477, Local Competition and Broadband Reporting Worksheet, must be submitted by "facilities based providers who have more than 250 high-speed service lines or wireless channels in service in a state."[23] The Commission noted that while this "relatively low threshold is necessary to capture an accurate picture of the current state of deployment"[24] it remained committed to "reduc[ing] the burdens associated with this request for small entities . . . by exempting the smallest service providers from reporting."[25]

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[21] Id., ¶ 23.

[22] Local Competition and Broadband Reporting (Report and Order), 15 FCC Rcd. 7717, ¶ 2 (2000).

[23] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (Third Notice of Inquiry), CC Docket No. 98-146, ¶ 8 (rel. Aug. 10, 2001).

[24] Local Competition and Broadband Reporting (Report and Order), ¶ 40.

[25] Id, ¶ 6.

Form 477 must also be filed by incumbent or competitive local exchange carriers "for states in which they provide 10,000 or more voice-grade equivalent lines or wireless channels."[26] In setting this threshold, the Commission noted that it had made "special efforts to detect the presence of competition for local exchange and exchange access services in rural areas" while "still exclud[ing] from reporting the smallest carriers and indeed, the vast majority of small LECs."[27]

ASCENT agrees with the Commission's characterization of carriers with fewer than 250 high-speed service lines or wireless channels or 10,000 or more voice-grade equivalent lines or wireless channels in any state as small providers. ASCENT further asgrees that such carriers are too small to exercise any significant influence on the public interest within the context of acquisition of control situations. Indeed, ASCENT believes that carriers pose virtually no risk to the public interest until they have reached market shares significantly larger than those which would trigger Form 477 reporting requirement. The reporting structure, however, may nonetheless be useful in formulating a market share threshold for purposes of determining when carriers will be eligible for streamlined treatment of domestic transfer of control applications.

ASCENT urges the Commission to adopt a presumption that for purposes of determining whether domestic acquisition of control transactions hold the potential for negatively impacting the public interest, carriers must possesses a market share of at least 10,000 high-speed service lines in any LATA (or 25,000 in any state) or 250,000 voice grade equivalent lines or wireless channels in any LATA (or 750,000 in any state). An acquisition of control transaction in

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[26] Id., ¶41.

[27] Id.

which neither party surpasses this threshold (and in which neither party has net telecommunications sales or total telecommunications revenues in excess of $500 million) would be deemed to qualify for streamlined treatment.

The Commission asks "what information applicants should provide to assist the Commission in determining whether an application merits streamlined treatment."[28] In the event the Commission adopts its tentative conclusion that it "should reserve its authority to remove applications from streamlined review, as it does in the case of international and wireless license transfers,"[29] it should be sufficient, in addition to the information outlined by the Commission in *Public Notice* DA 01-1654, for carriers seeking streamlined treatment to self-certify that both parties to the proposed transaction satisfy the above threshold showings.

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[28] *NPRM*, FCC 01-205, ¶ 30.

[29] *NPRM*, FCC 01-205, ¶ 32.

ASCENT also agrees that, to the extent applications for authority to acquire control are not filed pursuant to §63.18(e)(3) of the Commission's Rules, domestic acquisition of control transactions which would fall within the categories presently set forth in §63.24 of the Commission's Rules should likewise qualify for *pro forma* treatment, requiring merely that carriers inform the Commission of the completion of the assignment within 30 from the date the assignment is consummated.[30] No policy rationale exists for distinguishing between *pro forma* internal corporate restructurings on the basis of whether a carrier must proceed pursuant to the Commission's domestic or international Section 214 Rules.[31] On the other hand, since an internal corporate restructuring which results in a new or existing subsidiary assuming interstate carrier operations under section 214 from an existing parent or affiliated company may potentially raise the same public interest concerns as other acquisition of control transactions, such situations should only be afforded streamlined treatment when both entities can satisfy both threshold showings outlined above.

Consistent with the above, ASCENT urges the Commission to refrain from requiring the filing of domestic section 214 transfer of control applications in circumstances where the carriers have filed a similar application pursuant to §63.18 of the Commission's Rules, and to deem such domestic transfer of control authority granted upon grant of the §63.18 authority. ASCENT also urges the Commission to extend streamlined treatment of domestic transfer of

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[30] 47 C.F.R. §63.24.

[31] The Commission also asks whether a "Debtor-in-Possession" acquisition of control should similarly be treated as a *pro forma* assignment or transfer. *NPRM*, ¶ 27. ASCENT concurs that an acquisition of corporate control by a Debtor-in-Possession should qualify as a *pro forma* assignment within the scope of §63.24 of the Commission's Rules, with such treatment extended to domestic applications.

control applications submitted by non-dominant carriers when both parties to the proposed transaction can satisfy the thresholds set forth above.

Respectfully submitted,

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September 12, 2001

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